Supreme Court, U.S.
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No. 00-1200

IN THE

Supreme Court of the United States

CAROLYN BINNS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is the Due Process Clause implicated by a claim of judicial disqualification when the judge participating in a decision is not alleged to have a personal stake in the outcome, nor any actual bias or prejudice, and the only claim for disqualification is an alleged appearance of impropriety?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Wal-Mart Stores, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF THE CASE

This petition arises from a common-law tort action in which Carolyn Binns claimed damages from Wal-Mart Stores, Inc., for abuse of process and malicious prosecution. A jury found in favor of Mrs. Binns, and Wal-Mart appealed to the Supreme Court of Arkansas. Due to the recusal of two justices, pursuant to Arkansas law two attorneys were appointed as special justices for this case. One of those special justices was Special Justice Jonann Coniglio Fleischaier, who practices with the firm of Friday, Eldredge & Clark, which includes more than seventy lawyers in addition to Ms. Fleischaier. After briefing and oral argument, the Supreme Court of Arkansas held, in a 4-2 decision, that the verdicts for abuse of process and malicious prosecution were not supported by substantial evidence. The opinion of the Court was written by the Chief Justice. Special Justice Fleischaier was one of the justices who joined in that opinion.

Six months after the Supreme Court of Arkansas rendered its decision, and more than four months after the Supreme Court of Arkansas denied the petition for rehearing and issued the mandate, Mrs. Binns filed a Petition For Vacatur and alleged, for the first time, that Special Justice Fleischaier should have disqualified due to an appearance of impropriety. Mrs. Binns did not claim and has never claimed that Special Justice Fleischaier had any personal stake in the outcome of this case, nor that she had any actual bias or prejudice. The only claim made for disqualification asserted in the Petition For Vacatur was that Special Justice Fleischaier's participation created an appearance of impropriety.

The Petition For Vacatur and a Supplemental Petition for Vacatur alleged an appearance of impropriety based on the fact that, in two instances, Friday, Eldredge & Clark lawyers other than Special Justice Fleischaier, entered appearances as counsel of record for Wal-Mart. Wal-Mart did not engage Friday, Eldredge & Clark, nor did Wal-Mart pay any fees to Friday, Eldredge & Clark in those cases. The cases that created the alleged appearance of impropriety were products liability cases in which Wal-Mart was named as a defendant, but the supplier of the product had agreed to defend Wal-Mart and to indemnify Wal-Mart against any judgment. Wal-Mart had no financial interest in those cases because the defense was provided by the suppliers, and the suppliers were responsible for any judgment that might be entered. Friday, Eldredge & Clark was engaged by the suppliers who were providing the defense, not by Wal-Mart, and Friday, Eldredge & Clark was paid by those suppliers, not by Wal-Mart. No claim is made that Special Justice Fleischaier participated in any of those cases, nor that she has ever represented Wal-Mart in any capacity. The record does not show whether Special Justice Fleischaier was aware that other members of her firm had been engaged by Wal-Mart's suppliers and paid by Wal-Mart's suppliers in those cases. The Supreme Court of Arkansas voted unanimously to deny the Petition For Vacatur.

REASONS FOR DENYING THE WRIT

No constitutional issue, nor any federal question, is raised in this case. The sole issue is whether Special Justice Fleischaier should have disqualified due to an alleged appearance of impropriety. The question is governed purely by state law and does not give rise to a constitutional issue.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986), this Court held:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927); *see also FTC v. Cement Institute*, 333 U.S. 683, 702, 68 S. Ct. 793, 804, 92 L. Ed. 1010 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level").

Although the trend has been toward adoption of statutes that permit disqualification for bias and prejudice, and although the ABA Code of Judicial Conduct states that a judge should disqualify himself where he has a personal bias or prejudice, "that alone would not be a sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* "Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required. . . ." *Id.* at 821. Unlike Justice Embry in *Aetna Life Ins. Co. v. Lavoie*, here Special Justice Fleischaier did not have a direct, personal, substantial or pecuniary interest in the outcome of this case. Indeed, Special Justice Fleischaier had and has no stake at all in the outcome of this case. Where a judge has a personal stake in the outcome of a case, the Supreme Court of Arkansas follows the constitutional rule announced in *Aetna Life Ins. Co. v. Lavoie* that the judge must disqualify. *See Johnson v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988). Moreover, disqualification of a judge with a personal stake in a case is mandated by ARK. CONST. ART.

VII, § 20, which provides, in pertinent part, "No judge or justice shall preside in the trial of any cause in the event of which he may be interested. . . ." Thus, when a judge has a personal stake in a case, the Constitution of Arkansas, like this Court's decision in *Aetna Life Ins. Co. v. Lavoie*, mandates disqualification.

However, Mrs. Binns has never contended that Special Justice Fleischaier had any stake in the outcome of this case. Mrs. Binns' only claim was and is that Special Justice Fleischaier's participation created an appearance of impropriety. This is not one of the "most extreme of cases" in which "disqualification on this basis would be constitutionally required." *Aetna Life Ins. Co. v. Lavoie*, *supra*.

Under Arkansas law, when a party alleges that a judge's participation in a case results in an appearance of impropriety, and the judge has no gain or loss dependent on the outcome of the suit, the decision to recuse is within the judge's discretion and will not be reversed absent an abuse of that discretion. *Seeco v. Hales*, 341 Ark. 972, 1000-1, 22 S.W.3d 157, 174 (2000); *Sturgis v. Skokos*, 335 Ark. 41, 54, 977 S.W.2d 217, 223 (1998); *Dolphin v. Wilson*, 328 Ark. 1, 4, 942 S.W.2d 815, 817 (1997). Here, in denying the Petition For Vacatur, the Supreme Court of Arkansas apparently decided that Special Justice Fleischaier did not abuse her discretion. Five justices other than Special Justice Fleischaier reviewed the Petition For Vacatur. All five, including the two justices who dissented from the original decision reversing the judgment in favor of Mrs. Binns, voted to deny the Petition For Vacatur. We do not know whether this unanimous decision was based on the fact that Special Justice Fleischaier was unaware of and therefore uninfluenced by

Friday, Eldredge & Clark's appearance in cases in which Wal-Mart was a nominal party; or whether it was based on the fact that Wal-Mart did not engage or pay Friday, Eldredge & Clark nor have any financial interest in the cases that created the alleged appearance of impropriety, so that the relationship was too indirect and attenuated to hold that Special Justice Fleischaier abused her discretion; or whether it was based on the fact that Mrs. Binns failed to raise the issue until several months after the mandate was issued. What we do know is that the decision to deny the Petition For Vacatur was unanimous. Whether Special Justice Fleischaier abused her discretion, and whether the Supreme Court of Arkansas erred in concluding unanimously that she had not done so, are not issues that implicate the Due Process Clause nor any other provision of the Constitution of the United States. Therefore, this case presents no important federal issue that might be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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